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THE HINDU MARRIAGE ACT, 1955

By

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The Hindu Marriage Act (XXV of 1955) is now in force having obtained the assent of the President on 18th May, 1955. It is both an amending and codifying Act applicable throughout the whole of India except the State of Jammu and Kashmir. It is an important part of the new social planning and is bound to have wide repercussions. The Act has an overriding effect in the sense that any text, rule, or interpretation of Hindu law, or any custom or usage as part of that law in force immediately before the commencement of the Act shall cease to have effect with respect to any matter for which provision is made in the Act; and so also any other law in force immediately before the commencement of the Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in the Act.[1] The persons governed by the Act, namely, the Hindus as defined in the Act form about eighty per cent. of the total population of the country. It has been said that Hindu society presents almost every possible form of conjugal relationship from the grossest polyandry verging on promiscuity to the most rational form of monogamy, that while the sage idealised marriage as a samskara the savage practised it as a pastime. It is therefore all to the good that there should be a uniform law of marriage for all Hindus. The policy underlying the Act seems to be not to regard marriage any longer essentially as a tie consecrated and sanctioned by religion but to a large extent as one resulting from the free consent of the parties. It is noteworthy that under section 12 (1) (*c*) a marriage may be avoided on the ground that the consent of the petitioner thereto had been obtained by force or fraud. The religious element yields its primacy in favour of the secular element. Having regard to the objectives and the far-reaching character of some of the provisions of the Act, it is somewhat strange that the Act has not been given wider publicity and there has been no serious attempt at educating the public at least in regard to the major features of the Act particularly in rural areas. Monogamy has been made compulsory all over India among Hindus for both man and woman. Marrying again during the lifetime of a spouse with whom the marriage is subsisting is not merely an offence punishable under the Penal Code but renders the second marriage totally void.[2] In passing, it may be observed that though section 5 (*i*) of the Act prescribes as one of the conditions for a Hindu marriage that neither party has a spouse *living* at the time of the marriage the reference has to be read as reference to a living spouse with whom a marriage is subsisting at that time and not as including the case of a spouse who may be living but marriage with whom has been dissolved. Support is afforded to this view by the provision in section 15 declaring that a divorced person is free to marry again after the

1. Section 4.

1. Section 11.

lapse of a specified period from the date of the decree granting divorce. It is also useful to remember that though in the States of Bombay and Madras legislation had provided for the dissolution of Hindu marriages for specified reasons from 1947 and 1949 respectively, yet in other parts of India among Hindus the rule of monogamy for man equally as in the case of woman as well as the provision for dissolution of Hindu marriages are new features introduced practically for the first time. It is true that in the case of marriages terminated under sections 16 or 17 of the Native Converts Marriage Dissolution Act, 1866, the respective parties, which term will 'include the spouse remaining in Hinduism, acquire liberty and can lawfully marry again (*see* section 19). This result for the Hindu is reached only indirectly and incidentally. And such cases may not be many. In effect, therefore, the dissolubility of a Hindu marriage with both spouses continuing to be Hindus setting free each of the parties to marry again constitutes an innovation for the major part of the country. The result of a remarriage during the subsistence of a previous marriage will be that the woman will not acquire the status of a wife through such alliance and the children, if any, born of the union will be illegitimate. These are momentous and far-reaching results. There is therefore the need for intensive publicity in respect of these changes in the domestic law of the Hindus.

The achievement of a homogeneous Hindu society is evidently an objective of the Act. Section 2 (2), however, provides that nothing contained in the Act shall apply to the members of any Scheduled Tribe within the meaning of Article 366, clause 25 of the Constitution unless the Central Government otherwise directs by notification in the official gazette. The reservation is probably due to the low cultural level and high degree of illiteracy of these tribes rendering the enforcement of the provisions of the Act both inexpedient and difficult. A large part of the Hindu society is thus bound to remain for many years untouched by the Act. Even in regard to Hindus other than those belonging to the Scheduled Tribes, while section 4 lays down that customs inconsistent with the Act are overridden, sections 5 and 7 contain savings of customs and usages on a number of vital matters. The savings so made would not merely perpetuate the position as it existed prior to the passing of the Act but would also render the law nebulous and uncertain, thereby retarding the achievement of uniform laws for all Hindus. Thus among the conditions of a valid marriage are that the parties should not be within the degrees of prohibited relationship and should not be sapindas of each other. Each of these requirements is made subject to any custom or usage governing each of the parties.[1] The custom or usage may be local, tribal, or appertaining to a community, group or family.[2] Thus marriage with the maternal uncle's daughter, father's sister's daughter or even a sister's daughter will be valid in South India. The *status quo* in the matter is retained. Again, in regard to the ceremonies and rituals of marriage, section (1) provides that a Hindu marriage may be solemnised in accordance with the customary rites and ceremonies of either party. Under the law prior to the Act, non-performance of ceremonies will invalidate a marriage, *Venkatacharyulu* v. *Rangacharyulu*.[3] Ceremonies were essential even in the case of unapproved forms of marriage, *Brindavana* v. *Radhamani*.[4] Particular ceremonies may be dispensed with by custom, *Audikesavalu* v. *Ramanuja*.[5] Even the tying of a tali round the neck of the bride in the presence of the idol in a temple and friends and relations may suffice, In re *Ponnusami*.[6] Whether a marriage is religious or customary, ceremonies prescribed by religion or custom must be performed; otherwise the marriag will not be valid, *Deivanai* v. *Chidam-*

1. Section 5 clauses (*iv*) and (*v*).
2. Section 3.
3. (1890) I.L.R. 14 Mad. 316 : 1 M.L.J. 85.
4. (1888) I.L.R. 12 Mad. 72.
5. (1909) I.L.R. 32 Mad. 512 : 19 M.L.J. 656.
6. (1950) 2 M.L.J. 260.

baram.[1] The use of the word 'may' in section 7 (1) of the Act may lend itself to an argument that observance of ceremonies is not essential and that a marriage may be valid even in the absence of ceremonies, particularly as there is no provision anywhere in the Act prescribing that a marriage solemnised without ceremonies is void. But inasmuch as section 7 (2) lays down that where the customary rites and ceremonies include the saptapadi the marriage becomes complete and binding when the seventh step is taken, it looks as if the previous law on the matter is left untouched. Anyway the Act seems to proceed on the footing that even sastraic ceremonies are observed only by virtue of their incorporation into custom.

A novel feature of the Act is the recognition of a separate category of marriages as voidable marriages. The need for their recognition as a distinctive category is not clear. The grounds mentioned as rendering a marriage voidable may well have been included among the grounds on which a dissolution of the marriage may be had. Muslim law has a comparable classification of marriages which are not valid into *batil* and *fasid* marriages. The basis of distinction between void and voidable marriages is not, however, the same as that between *batil* and *fasid* marriages. In neither of these latter forms the woman has the status of a wife; but in a voidable marriage the woman will have that status till avoidance.

Another new feature of the Act is the postulation of degrees of prohibited relationship in section 3 (*g*). The rule is analogous to the rule against viruddha sambandha under the sastras. The enunciation of such relationship takes the form of categories, whereas under the Special Marriage Act, 1954, it consists of an enumeration of individuals. Analysis and comparison reveal that in substance the persons prohibited are the same under both the Acts except in some cases. While the Hindu Marriage Act makes every lineal ascendant or descendant of a person a prohibited person, the Special Marriage Act stops with the third generation exclusive of oneself either in the ascending or in the descending line. Again while the Special Marriage Act does not prohibit marriage with the widow of a collateral, such as the widow of a brother, the Hindu Marriage Act prohibits such alliances by express mention. Curiously enough though marriage with a brother's widow is not allowed there is no corresponding bar of marriage of a woman with the husband of her deceased sister.

The provision for judicial separation as a matrimonial relief is a new feature. Before the Act, a wife was permitted to sue for separate residence and manitenance for the reasons specified in the Hindu Married Women's Right to Separate Residence and Maintenace Act of 1946. Even earlier under the general Hindu law a wife could resist a suit for restitution of conjugal rights for similar reasons and where she was not maintained by the husband without justification she could enforce her right to maintenance by suit. The Act makes the relief of judicial separation equally available to both the spouses. The husband also may sue for the relief. The Act has added more grounds for the grant of the relief than were available in the case of a claim for separate residence and maintennce earlier, such as adultery. Another novel feature in regard to matrimonial relief is the provision for the grant of maintenance *pendente lite,* and permanent maintenance and alimony when decreeing matrimonial relief, to the husband by the wife in appropriate cases. In so far as sections 24 and 25 place the wife in the same position as the husband in the matter of such liability to provide maintenance the provision constitutes a new feature. It is true that the sastras had permitted the husband to have recourse to the stridhana of the wife during a time of distress but that was a strictly circumscribed right

1. (1955) 1 M.L.J. 120.

by way of provision for an emergency and carried with it the obligation to repay subsequently.

The Act contains a number of provisions relating to the effect of unsoundness of mind of a party to the marriage. Unless sorted out they are apt to puzzle. Under section 12, a marriage is liable to be avoided on the ground of either party having been a lunatic or idiot at the time of the marriage. The right arises by virtue of the requirement imposed in section 5 that neither party should be a lunatic or idiot at the time of the marriage. It seems to be clear that the provision is no more than a reproduction of the earlier law which had held that the validity of the marriage of a lunatic depended on the degree of lunacy at the time of the marriage, whether it was such as to preclude an understanding of the nature of the transaction, *Mouji Lal* v. *Chandrabati*[1]. The relevant time is the time of the marriage and the fact that the lunacy or idiocy may later on be cured can have no significance. What is needed is the free consent of the parties and where the infirmity precludes consent being free, the marriage becomes voidable. Cases may, however, occur where the party may be of sound mind at the time of marriage but may become unsound in mind subsequently. Under section 10 judicial separation can be had in such cases if the respondent had been continuously of unsound mind for a period of not less than two years immediately before the petition. Under section 13 (1) (*iii*) if a spouse had been continuously of unsound mind for a period of not less than three years before the petition it would afford cause for the dissolution of the marriage. Dissolution can also be had where after obtaining a decree for judicial separation on the ground of unsoundness of mind of the other spouse the parties had not resumed cohabitation for two years thereafter. In the result either decree for judicial separation by reason of unsoundness of mind for not less than two years coupled with non-resumption of cohabitation for two years thereafter or continuous unsoundness of mind for a period of not less than three years before the petition will suffice for obtaining dissolution of the marriage.

One of the grounds on which dissolution of a marriage can be sought is renunciation of the world by the other spouse and entering a religious order. This is reminiscent of the provision in the text attributed to Parasara permitting remarriage to women in five specified circumstances one of which is asceticism of the husband. Another ground permitted by the Act for dissolution of marriage is that the other spouse had not been heard of as alive for a period of seven years or more. The presumption of death which in such circumstances section 108 of the Evidence Act permits to be drawn becomes a lever for obtaining dissolution of the marriage.

The provision dealing with the legitimacy of a child begotten or conceived before a decree of nullity issues is rather cumbrous. It states that a child begotten or conceived before the decree of nullity is passed who would have been treated as legitimate if it was a case of divorce instead of nullity shall be deemed legitimate but no rights will accrue to the property of any person other than the parents except where such rights would have been available before the passing of the Act. In the case of divorce the status of the child conceived before but born after the decree is passed is controlled by section 112 of the Evidence Act, which provides that the fact that any person was born during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution, the mother remaining unmarried shall be conclusive proof that he is the legitimate child of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. For the rule in section 112 to operate there must

1. (1911) 21 M.L.J. 933 : L.R. 38 I.A. 122 : I.L.R. 38 Cal. 700 (P.C.).

be a valid marriage between the mother of the child and the man to whom the child is affiliated. A decree of nullity under the Hindu Marriage Act may be passed firstly under section 11 in the case of void marriages and secondly under section 12 in the case of voidable marriages. In the case of void marriages the requirement postulated by section 112 of the Evidence Act is not present and hence the child of a void marriage cannot be legitimate. It would thus seem that the provision as to legitimacy of the child in section 16 must be understood as referring to those cases only where a decree of nullity is granted on the ground of the marriage being voidable.

Difference of caste is immaterial in regard to the validity of a marriage. The Hindu Marriages Validity Act, 1949, had enacted that no marriage between two Hindus shall be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties had belonged to different castes. Identity of caste as a condition of a valid marriage having been abrogated by the Act of 1949, the Hindu Marriage Act does not advert to it except to incorporate in section 29, the rule enacted in 1949, with reference to marriages solemnised before the passing of the Act. Curiously enough the Hindu Marriage Act also like the Act of 1949 has not made any provision postulating equality of status as among children born of wives or husbands belonging to different castes. Sastraic law had regarded pratiloma marriages as void and in the case of anuloma marriages discriminatory provisions had been laid down regarding the rights of such mixed marriages. Under the Act of 1949 as well as under the Hindu Marriage Act of 1955, though the validity of mixed marriages is ensured there is no mention of the rights of children. It is not as if property rights have not at any point been touched upon by the present Act. In fact, in section 16, there is provision relating to rights of a child begotten or conceived before a decree of nullity is passed. It is desirable that the matter is clarified.

The Act contains provisions relating to registration of Hindu marriages. These are rather pitiful. If registration had been made obligatory it could be understood. Equally, if there was no provision on the matter. Registration under the Special Marriage Act is compulsory. Under the present Act section 8 empowers the State Government to make rules for the recording of the particulars relating to a Hindu marriage in a register called the Hindu Marriage Register, to be maintained for the purpose. The object is to facilitate proof of marriages. Registration is, however, to be optional. The State Government is given power to provide that registration shall be compulsory for all or any classes of persons. All the same non-registration is not to affect the validity of a marriage. Failure to register will at the worst entail liability to pay a fine up to Rs. 25. It looks as if the provision is only by way of a sop to those advocating complete secularisation of marriage and proceeds out of the realisation that public opinion is not yet ripe for such a transformation in the concept of marriage.

With all its weaknesses, the Act constitutes a bold social experiment. It can be successful in operation only if its principles are brought home to the common man and woman. Else it may cause considerable hardships, particularly to those who are away from the madding crowd and the hum and bustle of public and social life. Will government and concerned agencies act betimes?

(Madras Act XVI of 1951) increasing the Small Cause jurisdiction of a Subordinate Judge beyond Rs. 1,000—A note on the validity of.

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1. By Madras Act XVI of 1951, the State Government has increased the Small Cause Court jurisdiction of a Subordinate Judge from Rs. 1,000 to Rs. 2,000. (The Madras Civil and Village Courts (Amendment) Act XVI of 1951). In exercise of the powers conferred by section 28 of the Madras Civil Courts Act III of 1873, the High Courts of Madras and Andhra have empowered all Subordinate Judges (excepting certain subordinate Courts in Madras) to try Small Cause suits upto the value of Rs. 2,000. The question is whether this extension of powers increasing the pecuniary jurisdiction, is valid.

2. The jurisdiction of a Court of Small Causes is derived from section 15 of the Provincial Small Causes Court Act IX of 1887 (a Central Act). Section 15 (2) of the said Act fixes the upper limit of small cause jurisdiction at Rs. 500; and by sub-section (3), the State Governments are empowered to increase jurisdictional value upto Rs. 1,000 by passing an order. It was so increased by Act XVIII of 1926 in Madras. It follows that unless the Central Government amends section 15 (3) of the Central Act IX of 1887 empowering the State Governments to further increase the upper limit to Rs. 2,000, the State Governments have no power to further increase it beyond Rs. 1,000. The Amending Act XVI of 1951 seems to be beyond the powers conferred under section 15 (3) of the Privincial Small Causes Court Act IX of 1887.

3. Thus a conflict has arisen between the Central Act IX of 1887 and the State Act III of 1873 on account of the Amending Act (Madras) XVI of 1951. The question therefore that arises is: "Is the Madras Civil and Village Courts (Amendment) Act XVI of 1951, validly enacted, or is it *ultra vires* of the powers of the State Legislature?"

4. This is an important question; and unless it is settled and the conflict and doubts are resolved, it results in waste of public money and time and much uncertainty about jurisdiction.

5. Article 246, clause (3) of the Constitution Act of India, which came into force in January, 1950, gives power to Part A and B States to legislate in respect of items of Entries in List No. II to 7th Schedule (State List). Entry 65 of that List empowers the State Government to pass laws in regard to the Entries in List No. II and Entry No. 3 is the relevant entry which deals with administration of justice, constitution and organisation of all Courts, etc. Mr. A. S. Kuppuswamy, Advocate, in his Note published at page 26 of the MADRAS LAW JOURNAL, dated 11th August, 1955, seems to think that the above provisions of the Constitution Act furnish the complete answer to the question and opines that the amendment by the State Legislature to section 28 of Madras Act III of 1873 is valid and *intra vires* of the powers of the State Legislature.

6. The real question to consider is, whether the State Legislature has got the power to make the Amending Act so as to enhance small cause jurisdiction of a Subordinate Judge from Rs. 1,000 to Rs. 2,000 in the face of section 15, clause (3) of the Central Act IX of 1887? In other words can the State Legislature arrogate to itself more power than what was given to it by the Central law? The conflict and repugnancy between the State law and Central enactment is apparent. Can the State law prevail against the Central law? The reference made to section 246, clause (3), Entry 65 of the List No. II of the 7th Schedule of the Constitution Act does not provide an answer, *unless it can be said that the mere enactment of the said provisions in the Constitution Act itself, without any express provision to that effect, empowers the State Legislature to make the law under controversy.* The scope of Article 251 is confined to cases of Union laws made under Articles 249 and 250 only, which shall prevail against the law made by the Legislature of the State. Articles 254 is confined only to repugnancy between the State and Union laws within the concurrent field. The State law is void to the extent of its repugnancy (but subject to the provisions of clause 2 to that article) when it conflicts with the law made by the Parliament or to any provisions of an existing law with respect to one of the matter enumerated in the Concurrent list. Obviously, neither Article 251 nor 254 helps to answer the question.

7. Mr. S. Vaidyanathan, Advocate, Madras in his short note published in the MADRAS LAW JOURNAL, dated 25th August, 1955, supports the view taken by Mr. A. S. Kuppuswamy, Advocate, on three grounds, *viz.*:—

(*i*) Reliance is placed on the words "subject to the provisions of any enactment for the time being in force" occurring in section 15 of the Provincial Small Cause Courts Act and it is suggested that the Madras Act XVI of 1951 is such an enactment and therefore the same prevails against the provisions of the Central Act. The words "subject to any enactment, etc.," mean only any enactment of the Central Legislature in force at the time of passing of Act IX of 1887 and not any enactment of any other legislaure that may be passed subsequently. Again that clause relates to the category (*e.g.*, a suit for damages for infringement of copyright) of a suit than to value of the suit.

(*ii*) Article 254 is cited. I have already referred to that article. It provides for a case of conflicting enactments in regard to matters falling in the Concurrent List. It is said that the Article 254 is silent on the matter and therefore it is suggested that the silence lends support. One fails to understand this. On the other hand it may point the other way.

(*iii*) Maxwell on "Interpretation of Statutes" and the Latin maxim are quoted and it is said that a later Act may be taken as repealing an earlier Act. This may be so if both the later and earlier laws are passed by the same legislative authority. Such an interpretation is not possible in a case where a State law conflicts with the Union law. If that is so the question as to conflict of laws does not arise at all. The repeal of any Union or Central law can be achieved by a